PREME COURT, U. S.

DEC 9 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 816

UNITED STATES STEEL CORPORATION, Petitioner,

v.

JAN RONALD GUY

and

VIVIAN B. PRICE, Executrix of the Estate of Alfred S. Price, Deceased, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1968. On September 9, 1968, the Court of Appeals denied a Petition for Rehearing which had been timely filed by Petitioner on August 9, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Whether an order of a United States District Court under Fed.R.Civ.P. 14 which (a) severs a third-party claim from the principal action and (b) refuses the original defendant's motion for leave to add other third-party defendants is a final order entitled to immediate review under the collateral order doctrine where such order is the result of the District Court's fundamentally erroneous concept of the scope and purpose of federal third-party practice and the denial of immediate review effectively denies review altogether?

2. Whether a determination by the District Court under Fed.R.Civ.P. 54(b) is prerequisite to the right of a Court of Appeals to review such order?

STATUTE AND RULES INVOLVED

The following statutory provision and rules of civil procedure are set forth in Appendix B, *infra*, pp. 13-15: 28 U.S.C. § 1291 (1964); Fed.R.Civ.P. 54(b) and Fed.R.Civ.P. 14.

STATEMENT

This diversity action arises out of an unusual sequence of events which occurred in Pittsburgh, Pennsylvania in March 1965. Jan Ronald Guy, Plaintiff below, a resident of Texas, had come to Pittsburgh for an employment interview with the United States Steel Corporation, a New Jersey corporation, having its principal place of business in Pittsburgh, Pennsylvania. Following his interview, Guy and a United States Steel Corporation personnel supervisor who had participated in the interview went out on the town, became embroiled in an extended drinking bout, and ended up in Guy's hotel room, where, according to Guy, a homosexual assault was made upon him by the Steel Corporation employee. The Steel Corporation employee was thrown or pushed through the window of the hotel and fell to his death. Guy was charged with his murder and acquitted. Guy then brought this suit for damages in excess of $10,000 against the Steel Corporation, contending that it was liable to him, either on the theory that it was vicariously responsible for the acts of its deceased personnel supervisor, which were alleged to have occurred in the course and scope of his employment, or that it had subjected Guy to an unreasonable risk of harm in employing as a personnel supervisor a person of such propensities.

Within ten days after serving its answer to Plaintiff's Complaint, the Steel Corporation joined the Executor of the Estate of its deceased employee as a third-party defendant. About five weeks later the Steel Corporation sought leave to add, as additional third-party

defendants, the persons who were responsible for serving Guy and the Steel Corporation's employee the alcoholic beverages which they had consumed prior to the hotel episode which had culminated in the employee's death and had led to the principal action.

Guy objected to the joinder of additional third-party defendants and, at the same time, filed a motion to strike and/or sever from the principal action the third-party action between the Steel Corporation and the Estate of its deceased employee.

Both motions were heard before the Honorable Joseph P. Willson of the United States District Court for the Western District of Pennsylvania on March 18, 1968. On March 20, 1968, Judge Willson entered an order denying the Steel Corporation's request for leave to join additional third-party defendants and granting Plaintiff's motion to sever from the principal action the third-party claim which had already been filed as of right, in accordance with the provisions of Rule 14.

Timely appeals (which were consolidated) were taken to the United States Court of Appeals for the Third Circuit from these actions of the District Court.[1] Before the appeals were called for argument on the merits, Guy, Plaintiff below, filed a motion to dismiss the appeals on the grounds that the orders appealed from were non-appealable interlocutory orders.

After oral argument on the motion to dismiss, the Court of Appeals (per Judges Biggs, McLaughlin and Kalodner) granted the motion and dismissed the ap-

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1. The Steel Corporation also filed a Petition for a Writ of Mandamus or Prohibition, which application was refused.

peals on July 20, 1968. Petition for rehearing was denied on September 9, 1968.

The Court of Appeals delivered no opinion in support of its dismissal or of its refusal of the petition for rehearing. The action of the Court must have been grounded upon its belief that the orders appealed from were not final orders within 28 U.S.C. § 1291 (1964) or, if they were, that an appeal would not lie therefrom because of the absence of a Rule 54(b) determination and direction by the District Court for the entry of judgment.

REASONS FOR GRANTING THE WRIT

In explaining his rulings the District Judge disclosed a deeply-felt belief that Third-Party Practice should not ever be used to permit a principal to seek indemnity from an agent. He indicated that since he had first encountered the practice some years earlier, he had consistently refused to allow joinders seeking such indemnity, *see* Appendix A, pp. 12-13. Such a curiously arbitrary conception of the scope and purpose of third-party practice under Rule 14 is without precedent and such an interpretation seriously limits the effectiveness of Fed.R.Civ.P. 14.

The District Court's restrictive interpretation of Rule 14 is inconsistent with this Court's views of the proper occasion for third-party joinder: *Gilman v. United States,* 206 F.2d 846 (9th Cir. 1953), *aff'd,* 347 U.S. 507 (1954). Because it is applied generally in the Western District of Pennsylvania — if only by a single judge — such a practice should be corrected. However, the Court of Appeals' holding on the non-appealability of the District Court's rulings has effectively denied Petitioner (and, prospectively, all other persons similarly aggrieved) the opportunity ever to have the propriety of the District Court's restrictive interpretation of the Rule reviewed and corrected.

A. The Orders Appealed From Are Final Orders

The judgment of the Court of Appeals disregards this Court's "collateral order" test of finality. As stated by Mr. Justice Frankfurter in *DiBella v. United States,* 369 U.S. 121 (1962), at 125-6:

> "[S]o as not to frustrate the right of appellate review, immediate appeal has been allowed from an order recognized as collateral to the principal litigation because touching matters that will not 'affect, or . . . be affected by, decision of the merits view, immediate appeal has been allowed from an of [the] . . . case,' *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, when the practical effect of the order will be irreparable by any subsequent appeal."

This principle has received recognition in numerous decisions of this Court: *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (dismissal of claims by separate parties); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963) (venue order); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (order dissolving attachment of vessel).

The principle has been applied by the Courts of Appeals for various Circuits: *Plymouth Mutual Life Insurance Co. v. Illinois Mid-Continent Life Insurance Co.*, 378 F.2d 389 (3d Cir. 1967) (order appointing arbitrator); *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) (order dismissing class action but permitting litigation of individual claims); *MacAlister v. Guterma*, 263 F.2d 65 (2d Cir. 1958) (order consolidating actions for trial). *See* 6 J. MOORE, FEDERAL PRACTICE § 54.14, at 135-41 (2d ed. 1965, Supp. 1967).

Petitioner recognizes that under Fed.R.Civ.P. 14, District Courts are vested with discretion to refuse requests for the joinder of third-party defendants if made more than ten days after answer and to sever such

claims from the principal action even though effected earlier. *United States v. Yellow Cab Co.*, 340 U.S. 543, 556 (1951). A District Court's arbitrary exercise of such power, however, is the antithesis of discretion. The Court of Appeals' holding concerning the nonappealability of such orders poses a threat to the effective administration of justice by abdicating the power to review and correct the arbitrary action resulting from the District Court's too-restrictive view of Rule 14.

The judgment of the Court of Appeals in this case thus runs squarely counter to the admonition of Chief Justice Warren in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) at 306:

> "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." (Footnote omitted).

B. No Determination Under Rule 54(b) Was Required

At the oral argument on the motion to dismiss, the Court of Appeals indicated concern over whether the appealability of the District Court's order was not affected by the absence of a Rule 54(b) determination. The dismissal of the appeals may reflect the Court's opinion that such a determination is a prerequisite of appellate review of orders which are final under the collateral order doctrine. However, as stated in 6 J. MOORE, FEDERAL PRACTICE, § 54.12 [2], at 145 (2d ed. 1965):

> "Since amended Rule 54(b) applies only where multiple claims are involved, it has no applicability

to the collateral order doctrine which makes appealable certain orders dealing with matters that are not an ingredient of any claim." (Footnotes omitted).

The rationale of this statement is explored at length in 6 J. MOORE, FEDERAL PRACTICE § 54.31, at 235-7 (2d ed. 1965). Professor Moore's reasoning has received explicit approval in *Chabot v. National Securities and Research Corp.*, 290 F.2d 657 (2d Cir. 1961).

In *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) this Court (without squarely ruling on this interesting question) did not require a Rule 54(b) determination prior to its appellate review of collateral orders which it considered to be final. If a contrary belief is the ground of the Court of Appeals' judgment, this may reflect the need for a clarification of Rule 54(b) by this Court.

Respectfully submitted,

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REED, SMITH, SHAW & MCCLAY
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December 9, 1968

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAN RONALD GUY, Plaintiff v. UNITED STATES STEEL CORPORATION, a Delaware Corporation, Defendant.	Civil Action No. 67-689

Order on 3 Motions.

Counsel for the parties have been heard on several motions: (1) On November 8, 1967 defendant filed a motion to add several parties as third party defendants; that is, the owners of Club 630 Aspinwall, some 4 individuals by name. For the reasons mentioned at the hearing, this motion is denied but without prejudice. (2) The motion of plaintiff for summary judgment against the counterclaim filed against him by Vivian B. Price, the Executrix of the Estate of Alfred S. Price, Jr., deceased. The Price Estate was made a third party defendant. In the Estate's answer to the third party complaint, a counterclaim was filed by the Executrix against plaintiff Jan Ronald Guy. The allegations of the counterclaim are to the effect that plaintiff was solely responsible for the death of decedent Price, and the Executrix seeks compensatory and punitive damages. But it is noticed that plaintiff has filed no claim against the Price Estate by way of a complaint or crossclaim or otherwise in this case. The so-called counterclaim is, therefore, improper and is dismissed. (3) Plaintiff has filed a motion to sever the third party

action from plaintiff's case against defendant at least for trial purposes. Counsel have been heard on this motion also. It is to be observed that in the division of the business among the Judges of the Court, this case has been assigned to me for final disposition. For the reasons mentioned during the course of the argument, it is believed that plaintiff is entitled to proceed to trial against defendant on the basis of the allegations in his complaint unfettered by the third party action. It is not an ordinary case where the principal is charged as being liable for the torts of an agent as in a motor vehicle case. Plaintiff has charged defendant with being negligent in its own conduct in failing to take proper action when it knew or should have known of decedent's propensities.

As the Court sees it, the main thrust of the complaint is directed to the independent liability of the defendant. In the third party action, indemnity is claimed from the decedent's estate, but the issues here are different than the liability asserted by plaintiff against defendant. In seeking indemnity defendant asserts the right of a principal to recover from its agent for the damage caused the principal by the misconduct of the agent.

Under these circumstances and in view of the nature of the case, plaintiff's motion to sever is granted, and plaintiff may try his case prior to the trial of the third party action.

IT IS SO ORDERED this 20th day of March 1968.

JOSEPH P. WILLSON
United States District Judge

Appendix A.

Excerpts From Transcript of Proceedings

Hearing on Motion to Add Third-Party Defendant,
Motion to Strike and/or Sever Third-Party
Claim, Motion for Summary Judgment
Held at Pittsburgh, Pennsylvania
Monday, March 18, 1968

Before: HONORABLE JOSEPH P. WILLSON, Judge

* * * *

[9] *The Court*: I don't allow an owner to name his driver in a third-party action—the truck driver.

Mr. Helwig: I didn't know that.

The Court: There is a tendency in this case in the same light. Not quite, but it has the same tendency to rather shift it back to this fellow. Your case is a little different.

The main reason, of course, there, is that everybody knows that the driver is protected by the same policy as the owner is, in most cases, in 99.4 per cent. It is a waste of time. At the same time, it has a tendency to keep the verdict down, when the defendant can argue [10] that.

The first man who tried to do that with me was Charles Margiotti, in the last year of his life. He used to do it, I guess, up to then. He tried to do it with a railroad case. He wanted to make the engineer of the railroad a third-party defendant, for the B. & O. That is kind of silly, isn't it?

Mr. Helwig: I'm not so sure.

The Court: I think it is in this day and age.

[29] * * * *

The Court: I don't like the idea of the principal coming in on the agent on indemnity. That is always contrary to my concept of what ought to be done in this day and age.

* * * *

APPENDIX B

28 U.S.C. (1964)

§ 1291. FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. (June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.)

Rule 54

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which

adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 14.

Third-Party Practice

(a) When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counter-claims against the third-party plaintiff and and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's

claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.